STATE OF WISCONSIN

IN THE SUPREME COURT

RENEE K. VANCLEVE and
THOMAS G. VANCLEVE,

Plaintiffs/Respondents/Petitioners,

v

CITY OF MARINETTE and
WAUSAU INSURANCE COMPANY,

Defendants/Appellants,

KENNETH KELLER, d/b/a KELLER
CEMENT CONTRACTORS, AUTO OWNERS
INSURANCE and STATE FARM FIRE &
CASUALTY, CO.,

Defendants.

Court of Appeals No: 01-0231

Marinette Co. Circuit Court File No: 99-CV-98

Plaintiffs/Respondents/Petitioners' Brief

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Plaintiffs/Respondents/Petitioners' Statement Of The Issues

1. Did the Court of Appeals err as a matter of law by treating *Wis Stat 81.17* as an immunity statute rather than a priority collection statute, thereby requiring reversal by this Court as the trial judgment remains unsatisfied in whole or in part and the defendant city is thus responsible to pay the remaining outstanding amount?

The plaintiffs/respondents/petitioners answer, "Yes,"

The trial court answered, "Yes,"

The defendant/appellant City of Marinette answers, "No;"

The Court of Appeals answered, "No."

2. What effect does entering into a valid Pierringer agreement with a settling defendant have in enforcing judgment against a non-settling municipality pursuant to *Wis Stat 81.17*?

The plaintiffs/respondents/petitioners answer the defendant/appellant City of Marinette can be held responsible for its 90% of causal negligence pursuant to the jury's verdict,

The trial court held that the defendant/appellant City of Marinette was responsible for its percentage of causal negligence pursuant to the jury's verdict,

The defendant/appellant City of Marinette and the Court of Appeals answered the City of Marinette cannot be held responsible for satisfying the judgment for its 90% causal negligence.

3. By dismissing all claims it had against Ken Keller, d/b/a Keller Cement Contractors, did the defendant/appellant City of Marinette fail to deny its primary liability, making *Wis Stat 81.17* inapplicable to this action?

The plaintiffs/respondents/petitioners answer, "Yes,"

The trial court answered, "Yes,"

The defendant/appellant City of Marinette answers, "No;"

The Court of Appeals answered, "No."

4. Did the defendant/appellant City of Marinette, which has a unique statutory right under *Wis Stat 81.17*, to deny primary liability, have standing to object to the Pierringer release entered into between Ken Keller, d/b/a Keller Cement Contractors and the plaintiffs/respondents/ petitioners?

The plaintiffs/respondents/petitioners answer, "Yes,"

The trial court answered, "Yes,"

The defendant/appellant City of Marinette answers, "No;"

The Court of Appeals answered, "No."

5. **If *Wis Stat 81.17* is applicable to this action, can judgment be entered against Ken Keller, d/b/a Keller Cement Contractors pursuant to the terms of the Pierringer Release, thereby fulfilling the requirements of *Wis Stat 81.17* and obligating the defendant/appellant City of Marinette to satisfy its portion of the 90% amount verdict which remains unsatisified in whole or in part?**

The plaintiffs/respondents answer, "Yes,"

The trial court answered, "Yes,"

The defendant/appellant City of Marinette did not answer this question;

The Court of Appeals answered, "No."

Statement Regarding Oral Argument And Publication

It is plaintiffs/respondents/petitioners' position oral argument is necessary to fully delineate the scope of the arguments presented herein. Therefore, the plaintiffs/respondents/petitioners request that oral argument be conducted in this matter.

Publication of this decision is warranted as this case appears to be one of first impression in construing the effects of a Pierringer agreement and enforcing a judgment against a municipality pursuant to *Wis Stat 81.17*. Therefore, it is believed a published opinion would be helpful as it will have state-wide impact and become binding precedent.

Statement Of The Case And Facts

On 24 August, 1998, Renee VanCleve injured her right knee when she fell in a trench adjacent to a newly installed cement curb in the City of Marinette. In this action, a complaint and jury demand was filed in the Marinette County Circuit Court by plaintiffs/respondents Renee and Tom VanCleve against the defendant/appellant City of Marinette as well as Ken Keller, d/b/a Keller Cement Contractors. Ken Keller was named as a defendant based on information provided by the City that he was also responsible for the trench at the corner of Wells and Newberry located within the City of Marinette which resulted in Renee VanCleve's injury on 24 August, 1998.

In its initial responsive pleading, the defendant City of Marinette cross-claimed against defendant Ken Keller, d/b/a Keller Cement Contractors for contribution. R. 9, App. 101-104. After extensive discovery, the plaintiffs Renee and Tom VanCleve reached a compromise settlement whereby Ken Keller, d/b/a Keller Cement Contractors, agreed to pay $7,500.00 in exchange for a full and final Pierringer Release from the plaintiffs which was executed on 5 August, 2000. App. 105-107.

The Pierringer Release specifically provided that the plaintiffs did not waive any potential claims against the city, released Keller from his fraction, portion, or percentage of the total cause of action, and agreed to indemnify Keller and hold him harmless from any claims for contribution or indemnity made by others who may be jointly liable with the released parties.

The Pierringer Release also stated in relevant part:

> As a further consideration of this Release, the undersigned agree to indemnify the released parties and hold them harmless from any claims for contribution or indemnity made by others who may be jointly liable with the released parties, and the undersigned agree to satisfy any judgment which may be rendered in favor of the undersigned satisfying such fraction, portion, or percentage of the judgment as the causal negligence of the parties released is adjudged to be of all causal negligence of all adjudged tort-feasors. In the event the undersigned fail to immediately satisfy any such judgment to the extent of such fraction, portion, or percentage as found against the parties released, the undersigned hereby consent and agree that, upon filing a copy of this Release and without future notice, an order may be entered by the court in which said judgment is entered directing that the clerk thereof satisfy such judgment to the extent of such fraction, portion, or percentage of the negligence as found against the parties released and discharged under this Release.

On 4 September, 2000, a stipulation to dismiss Ken Keller, d/b/a Keller Cement Contractors, with prejudice and without costs was signed by all parties and entered with the court. Specifically, the defendant/appellant City of Marinette dismissed all cross-claims it had against Ken Keller, d/b/a Keller Cement Contractors, with prejudice and without costs. R. 23, App. 108-110.

Settlement with the City did not occur. A two day jury trial commenced on 18 October, 2000, in the Marinette County Circuit Court. On 19 October, 2000, a twelve person jury rendered its special verdict and found the City of Marinette 90% causally negligent, Ken Keller 9% causally negligent, and Renee VanCleve 1% causally negligent. R. 42, App. 111-113. The jury awarded Renee VanCleve $15,000.00 in past non-economic loss damages and $60,000.00 in future non-economic loss damages. By stipulation of the parties, the jury was not asked to award money damages for Renee VanCleve's past medical expenses which were paid by Wausau Insurance Company pursuant to a no-fault med-pay provision which covered any person injured within the City of Marinette irrespective of liability. At the time she fell on 24 August, 1998, Renee VanCleve did not have applicable insurance to cover her medical costs, and therefore

$7,361.00 was paid by Wausau Insurance pursuant to the med-pay provision.

Following trial, the defendant/appellant City of Marinette filed a motion for judgment on the verdict pursuant to *Wis Stat 805.14(5)(a)* seeking to have the City of Marinette and Wausau Underwriters Insurance Company dismissed from the lawsuit with prejudice. The defendant/appellant City of Marinette claimed that because defendant Ken Keller had been dismissed from the suit, judgment could not be entered against him, the requirements of *Wis Stat 81.17* could not be met, and thus the city could not have a judgment entered against it despite the fact the jury assessed them with 90% causal negligence.

The trial court, after hearing oral argument and considering the briefs filed by the parties, ordered that judgment be entered against the city in the amount of $49,311.15, which included agreed upon taxable costs and a compromised amount for the $7,361.00 paid by Wausau Insurance pursuant to the med-pay provision. R. 51, App. 114. The stipulated judgment amount also reflected the fact recovery against the defendant/appellant City of Marinette was limited to

$50,000.00 by governmental immunity pursuant to *Wis Stat 893.80(3)*.

The defendant/appellant City of Marinette appealed the trial court's decision to enter judgment in favor of the plaintiffs/respondents for the $49,311.15 amount. In its decision dated 18 December, 2001, the Court of Appeals, after hearing oral argument and considering the briefs, reversed the trial court's order. App. 115. The plaintiffs/ respondents/petitioners petitioned this Court to review the court of appeals' decision, and this Court granted the petition. The plaintiffs/respondents/ petitioners respectfully request that the court of appeals' decision be reversed and that judgment be entered against the defendant/appellant City of Marinette for $49,311.15, plus interest and costs. In the alternative, the plaintiffs/ respondents/petitioners respectfully request that this matter be remanded to the trial court for further proceedings and entry of judgment.

Argument

A. The Defendant/Appellant City Of Marinette Cannot Rely Upon *Wis Stat 81.17* For Governmental Immunity As It Is A Priority Collection Statute, The City Failed To Deny Primary Responsibility, Judgment Can Be Entered Against Ken Keller, d/b/a Keller Cement Contractors, And The City Is Responsible For The Remaining 90% Portion Of The Judgment Which Remains Unsatisfied In Whole Or In Part

In its appeal, the defendant/appellant City of Marinette erroneously relied upon *Wis Stat 81.17* in an effort to once again deny its responsibility for the trench which injured Renee VanCleve on 24 August, 1998. The defendant/appellant claimed *Wis Stat 81.17* makes Ken Keller primarily liable for his negligence. However, what the defendant/appellant City and the court of appeals failed to recognize is that *Wis Stat 81.17* is inapplicable to the present action as Ken Keller has been dismissed from the lawsuit with prejudice by both the plaintiffs and the defendant City of Marinette, and therefore is no longer a party to this lawsuit. Thus, *Wis Stat 81.17* is inapplicable to the present action because the City of Marinette did not deny its primary liability. Furthermore, this statute, contrary to how the court of appeals characterized it, is not an immunity statute but rather a priority collection provision. *Wis Stat 81.17* is set forth in full as follows:

> Whenever damages happen to any person or property by reason of any defect in any highway or other public ground, or from any other cause for which any town, city, village or county would be liable, and such damages are caused by, or arise from the wrong, default or negligence thereof and of any person, or private corporation, such person or private corporation shall be primarily liable therefor; but the town, city, village or county may be sued with the person or private corporation so primarily liable. **If the town, city, village or county denies its primary liability and proves upon whom such liability rests the judgment shall be against all defendants shown by the verdict or finding to be liable for damages; but judgment against the town, city, village or county shall not be enforceable until execution has been issued against the party found to be primarily liable and returned unsatisfied in whole or in part; on such return being made the defendant town, city, village or county shall be bound by the judgment. The unpaid balance shall be collected in the same way as other judgments.** [Emphasis added.]

In this case, plaintiffs/respondents/petitioners Thomas and Renee VanCleve filed a direct action against both the City of Marinette and Ken Keller, d/b/a Keller Cement Contractors. In its first responsive pleading, the City of Marinette answered the complaint and asserted a cross-claim against Ken Keller which stated in relevant part that, "In the event that joint causal negligence was found on the City of Marinette and Ken Keller d/b/a Keller Cement Contractors, then and in that event answering defendant, City of Marinette, will be entitled to contribution and/or indemnification as provided by law."

Prior to the first scheduled trial, a settlement was reached between the plaintiffs/respondents/petitioners Thomas and Renee VanCleve against Ken Keller d/b/a Keller Cement Contractors. The plaintiffs signed a Pierringer Release. The City was provided a copy of the release and never objected to the settlement or the release. In addition, the defendant/ appellant City of Marinette also agreed to dismiss all cross-claims against Ken Keller, thereby extinguishing its rights to contribution and/or indemnification. A stipulation and order to that effect was signed by all counsel for the parties and was signed by the trial court on 4 September, 2000, and entered for filing.

By also dismissing Ken Keller, d/b/a Keller Cement Contractors, the defendant/appellant City of Marinette waived any assertions that it was not primarily responsible or liable in this action. The City of Marinette could have kept Ken Keller in the lawsuit and sought contribution and/or indemnification as provided by law. It chose not to do so. By dismissing its cross-claims against Ken Keller, it waived any rights it had to now deny primary liability pursuant to *Wis Stat 81.17*.

Furthermore, the crux of the defendant/appellant City of Marinette's argument is that because Ken Keller has been dismissed from the lawsuit, judgment cannot be entered against him, which the City claimed is a prerequisite to enforcing a judgment against it pursuant to *Wis Stat 81.17*. However, when viewing the plain language of the Pierringer Release, it is apparent judgment can be entered against Ken Keller for such fraction, portion, or percentage of causal negligence the released parties are adjudged to be. In addition, pursuant to the Pierringer Release, if Renee and Thomas VanCleve fail to immediately satisfy any such judgment to the extent of such fraction, portion, or percentage found against the released party (Keller), the VanCleve's consent and agree that upon filing a copy of the release and without future notice, an order may be entered by the court in which such judgment is entered directing that the clerk thereof satisfy such judgment to the extent of such fraction, portion, or percentage of the negligence as found against the parties released and discharged pursuant to the Pierringer Release. Therefore, judgment can be entered against Ken Keller, d/b/a Keller Cement Contractors, and the remaining 90% of the entire judgment remains unsatisfied in whole or in part. Thus, judgment can

be entered against the defendant/appellant City of Marinette in the stipulated $49,311.15 amount.

In addition, the City of Marinette never objected to the stipulation and order to dismiss its cross-claims against Ken Keller with prejudice and without costs. It could have chosen to keep Keller in the lawsuit to make the argument it made to the court of appeals. However, it failed to do so. It is plaintiffs/ respondents/petitioners' position that given its unique position under *Wis Stat 81.17*, the City of Marinette had a right to object to the Pierringer release and did not need to stipulate to dismiss its cross-claims against Keller.

Therefore, because the judgment will remain unsatisfied in whole or in part, pursuant to the provisions of *Wis Stat 81.17*, the City of Marinette shall be bound by the judgment and the unpaid balance shall be collected in the same way as other judgments. Reading this provision, the City of Marinette is responsible for the 90% causal negligence portion of the judgment attributed to it.

Even if *Wis Stat 81.17* applied to this action, this statute is in place to insulate the City from those portions of any

verdict which it is not responsible for paying. However, it does not insulate the City from those portions of the verdict which the jury finds it responsible for paying. If that were the case, the statute would explicitly state this, but it does not. If that were the case, the statute would simply say that if another party is found negligent, the city is not responsible irrespective of the percentage breakdown of causal negligence if there is applicable insurance coverage to cover the entire judgment. This is absurd. Further, the plaintiffs/respondents/petitioners agree that the city is not responsible for paying the $6,750.00 amount attributable to Ken Keller (9% of $75,000 verdict), and that is the entire point of *Wis Stat 81.17*.

Under the clear language of *Wis Stat 81.17*, the entire amount of the judgment has not been satisfied in whole or in part. Based upon the verdict and agreement of the parties prior to trial, the City undisputably receives a credit for the $6,750.00 worth of damages attributed to Ken Keller. Thus, there remains $68,250.00 of an unsatisfied judgment based on the verdict. The plaintiffs/respondents/ petitioners also agree that $750.00 of the unsatisfied judgment is attributable to Renee VanCleve's 1% causal negligence. Thus, the City's portion of the judgment, 90%,

remains for the defendant/appellant City to satisfy. The stipulated judgment amount, which totals $49,311.15, therefore remains unpaid.

Finally, the plaintiffs/respondents/petitioners point out that the case primarily relied upon by the defendant/ appellant City of Marinette, *Weis v AT Hipke & Sons, Inc, 271 Wis 140, 72 NW2d 715 (1955)*, was decided before Pierringer Releases were even ratified. Furthermore, *Weis* is distinguishable from the present case as *Weis* involved a situation whereby a contractor, who was being directly sued, filed a cross-complaint against a municipality. In this case, a direct action was brought against the city, and the city remained a party with the executed Pierringer release in place. Thus, the facts of *Weis* are different than the present situation, and the present case must be examined in relation to the Pierringer agreement and is distinguishable from *Weis*.

In addition, if the defendant/appellant's argument was adopted, it would not encourage the settlement of personal injury claims with non-municipality defendants such as in the present action. The social policy favoring settlements is stronger than that favoring contribution among tort-

feasors. *Smith v Rural Mutual Insurance Company, 20 Wis 2d 592, 603, 123 NW2d 496, 503 (1963).*

In addition to vitiating the well supported goal of settling civil lawsuits when possible, the defendant/appellant City of Marinette's argument also is contrary to the trend of tort liability in Wisconsin and would run counter to the thrust of *Holytz v City of Milwaukee, 17 Wis 2d 26, 115 NW2d 618 (1962)*, in which the Supreme Court abrogated the doctrine of governmental immunity. In *Dickens v Kensmoe, 61 Wis 2d 211, 218, 212 NW2d 484, 488 (1973)*, the Supreme Court considered governmental immunity and the application of *Wis Stats 81.15* and *81.17*, and stated as follows:

> Enlarging the cases by judicial construction in which governmental units are only secondarily liable is in effect granting partial or conditional immunity. Having abolished governmental tort immunity, §*81.15, Stats.*, which was related to §*81.17*, is no longer needed as a basis of liability and its existence is somewhat ambiguous. It has been suggested 'A lot of confusion in the practice would be avoided if legislature would repeal §*81.15*,' *Schwartz v Milwaukee, 43 Wis 2d 119, 168 NW2d 107 (1969)*, and that the section 'exists only to provide the procedure to prosecute a claim for negligence and as a limitation upon the amount of recovery for negligence relating to the sufficiency or want of repair of a highway,' *Schwartz v Milwaukee, 54 Wis 2d 286, 195 NW2d 480 (1972).*
>
> This court has not been inclined to widen the scope of the statute. In *Armour v Wisconsin Gas Co, 54*

> *Wis 2d 302, 195 NW2d 620 (1972)*, this court restricted §*81.17, Stats.*, to defects in highways and would not enlarge the concept by the construction of 'or from any other cause' to mean anything other than a defect in the highway. Since *Holytz*, public policy has not demanded that a municipality should be only secondarily liable for a defect in highways which is a contributing substantial factor in the cause of an injury.

Thus, despite the fact the plaintiffs/respondents/ petitioners satisfied the requirements of *Wis Stat 81.17*, its purpose and binding effect are ambiguous at best given abolition of governmental immunity in Wisconsin. The defendant/appellant City of Marinette is not only protected by the $50,000.00 limit pursuant to *Wis State 893.80(3)*, but they are trying to further insulate themselves from liability pursuant to *Wis Stat 81.17*. The City of Marinette's attempt to deny responsibility must be summarily rejected.

Conclusion

Wherefore, for all the foregoing reasons, the plaintiffs/respondents/petitioners request that this Honorable Court reverse the court of appeal's decision and affirm the trial court's decision to enter judgment in the amount of $49,311.15, and in addition award all costs and interest as allowed by law.

Dated: May 21, 2002

PETRUCELLI & PETRUCELLI, P.C.
Attorneys for
Plaintiffs/Appellees/Petitioners

By: _____

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Certification

I certify that this brief meets the form and length requirements of rule *809.19(8)(b)* and *(c)* in that it is:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 14 pages.

Dated: May 21, 2002

PETRUCELLI & PETRUCELLI, P.C.
Attorneys for
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Appendix

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STATE OF WISCONSIN CIRCUIT COURT MARINETTE COUNTY

RENEE K. VANCLEVE and
THOMAS C. VANCLEVE,

Plaintiffs

vs.

CITY OF MARINETTE, KENNETH KELLER d/b/A KELLER CEMENT CONTRACTORS, and AUTO-OWNERS INSURANCE,

Defendants,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Nominal Defendant.

CASE NO. 99-CV-98

CODE NO. 30107

ANSWER, ANSWER TO CROSS-CLAIM, AFFIRMATIVE DEFENSES AND CROSS-CLAIM

NOW COMES the above named defendant, City of Marinette, by its attorneys, Law Offices of STILP AND COTTON, by James O. Moermond III, and as and for its answer to the plaintiffs' Complaint, allege and show to the Court as follows:

1. Except as specifically admitted herein, all allegations of the plaintiffs' Complaint are denied.

2. This answering defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraphs 1, 3, 4, 5, 7, 16, 17, 18, 19, 20, 25, 26 and its sub parts, 27, 28, 29, 30, 31, and 32, and therefore denies.

3. In response to the allegations contained in paragraphs 12, 13 and its sub parts, 14, and 15, deny.

4. In response to the allegations contained in paragraphs 6 and 11, admit that an accident occurred on or about August 24, 1998, but deny any allegations of negligence or wrongdoing on the part of the City of Marinette.

5. In response to the allegations contained in paragraphs 2, 22, and 24, admit.

6. In response to paragraph 21 admit only that the defendant City of Marinette, was served with documents entitled Notice of Claim pursuant to Wisconsin Statutes Section 893.80, and Itemized Statement of Relief pursuant to Wisconsin Statutes 893.80 on October 23, 1998, and affirmatively allege that these documents are documents and as such speak for themselves and deny that the statutory requirements have been met in this case and, therefore, put the plaintiffs to their proof thereon.

7. In response to paragraphs 9 and 10, this defendant admits only that it does exercise jurisdiction and authority over the public sidewalks and public streets within the City of Marinette, including the public sidewalks and public streets, in front of the property located at 903 Wells Street, in the City of Marinette; however, this defendant denies knowledge that the actual location of the plaintiff's alleged fall was on property owned or controlled by the City, and therefore, denies and puts the plaintiffs to their proof thereon.

8. In response to paragraphs 8 and 23, reallege and restate all prior responses.

Answer to Cross-Claim

1. This answering defendant restates, realleges, and incorporates by reference all of the answering defendant's previous answers made to the Complaint of the plaintiff herein, and

specifically denies any and all negligence on the part of the City of Marinette, its agents and employees, at all times material to this lawsuit.

2. This answering defendant denies that the cross-claiming defendant is entitled to contribution and/or indemnification from this answering defendant.

Affirmative Defenses

1. As and for a first affirmative defense, this answering defendant alleges that this action, and any recovery in this action, is subject to the provisions contained in Wisconsin Statute Sections 893.80(1), 893.80(3), 893.80(4), 81.15, and 81.17.

2. As and for a second affirmative defense, this answering defendant alleges that upon information and belief the injuries to the plaintiffs, if any, were the result of their own contributory negligence, and that the plaintiffs' contributory negligence exceeds any negligence on the part of the defendants as a matter of law.

3. As and for a third affirmative defense, this answering defendant alleges that the plaintiffs may have failed to name necessary parties pursuant to Wisconsin Statutes Section 803.03, or otherwise.

4. As and for a fourth affirmative defense, this answering defendant alleges that the plaintiffs may have failed to mitigate their damages, if any.

This answering defendant asserts and incorporates herein by reference the affirmative defenses set forth under Wisconsin Statutes Sections 802.06(2) and 802.02(3) so as to avoid waiver of same pending further investigation and discovery.

Cross-Claim

As and for a cross-claim against Kenneth Keller d/b/a Keller Cement Contractors, and Auto-Owners Insurance, this answering defendant alleges as follows:

1. Reallege and incorporate herein by reference as if set forth at length all allegations of the plaintiffs' Complaint except as modified by the preceding paragraphs of this Answer, Answer to Cross-Claim, and Affirmative Defenses.

2. In the event that joint causal negligence is found on the City of Marinette and Kenneth Keller d/b/a Keller Cement Contractors, then and in that event answering defendant, City of Marinette, will be entitled to contribution and/or indemnification as provided by law.

WHEREFORE, this answering defendant demands judgment as follows:

A. For dismissal of the plaintiffs' Complaint on its merits, and with prejudice.

B. For dismissal of all cross-claims, on the merits, and with prejudice.

C. For the costs and disbursements of this action, including attorney's fees, and for such other and further relief as the Court deems just and equitable.

Dated this 21st day of May, 1999.

STILP AND COTTON
Attorneys for Defendant
City of Marinette,

By: _____
James O. Moerlhond III
1018954

I Certify That on 5/21/1999
I Served the Within Document on Counsel of Record by Mail, Pursuant to Wis. Stats.801.14(2)
_____
Law Offices of Stilp and Cotton

P.O. Address:

400 Westwood Drive
PO Box 8016
Wausau, WI 54402-8018

Telephone: 715-847-8064

PIERRINGER RELEASE

For the sole consideration of the sum of Seven Thousand Five Hundred Dollars ($7500), the receipt of which is hereby acknowledged, RENEE K. VANCLEVE and THOMAS C. VANCLEVE, hereinafter referred to as the undersigned, fully and forever release and discharge Kenneth Keller, d/b/a Keller Cement Contractors, and Auto-Owners Insurance, and their insurers from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses, and compensation, whatsoever, which the undersigned have or will have arising out of any and all known and unknown, foreseen and unforeseen, bodily injuries, death and property damage and consequences thereof resulting, or to result from, a fall which occurred on August 24, 1998 in the area of 903 Wells Street, Marinette, Wisconsin which is the subject of Marinette County Circuit Court Case No. 99-CV-98.

In accepting this settlement, the undersigned hereby release and discharge that fraction, portion, or percentage of the total cause of action or claims for damages the undersigned now have or may hereafter possess against all parties responsible for injuries and property damage to the undersigned which shall, by trial or other disposition, be determined to be the sum of the fractions, portions, or percentages of causal negligence for which the parties released herein are found to be liable to the undersigned as a consequence of the above action.

The undersigned, agree that payment of the above sum is not to be construed as an admission of liability by or on behalf of the released parties by whom liability is expressly denied.

This Release is intended to release Kenneth Keller, d/b/a Keller Cement Contractors, his agents, servants, and employees and Auto-Owners Insurance. The undersigned expressly reserve the balance of the whole cause of action or any other claim of whatever kind or nature not released hereby which they may have or hereafter have against any other person or organization, including, but not limited to, the City of Marinette, arising out of the above described fall.

As a further consideration of this Release, the undersigned agree to indemnify the released parties and hold them harmless from any claims for contribution or indemnity made by others who may be jointly liable with the released parties, and the undersigned agree to satisfy any judgment which may be rendered in favor of the undersigned satisfying such fraction, portion, or percentage of the judgment as the causal negligence of the parties released is adjudged to be of all causal negligence of all adjudged tort-feasors. In the event the undersigned fail to immediately satisfy any such judgment to the extent of such fraction, portion, or percentage as found against the parties released, the undersigned hereby consent and agree that, upon filing a copy of this Release and without future notice, an order may be entered by the court in which said judgment is entered directing that the clerk thereof satisfy such judgment to the extent of such fraction, portion, or percentage of the negligence as found against the parties released and discharged under this Release.

By signature hereto, the undersigned hereby declare and certify that the terms of this Release have been read and understood. It is expressly understood by the undersigned that, by their signatures hereto, they are releasing forever the right to bring a claim against the released parties in any way as related to the above-referenced fall,

even if it is later determined that the injury or damage from the subject accident was more severe or of a kind different in nature than thought at the signing of this document.

WITNESS my hand and seal this 5th day of ~~July~~ August, 2000.

CAUTION! READ BEFORE SIGNING

Renee K. VanCleve

Renee K. VanCleve

STATE OF WISCONSIN)
) SS.
Marinette COUNTY)

On this 5th day of August, 2000, before me personally appeared Renee VanCleve, to me known to be the person described herein and who executed the foregoing instrument and acknowledged that he voluntarily executed the same.

Notary Public, State of Wisconsin
My Commission Expires: 5/3/02

WITNESS my hand and seal this 5th day of ~~July~~ August, 2000.

CAUTION! READ BEFORE SIGNING

Thomas C. VanCleve

STATE OF WISCONSIN)
) SS.
Marinette COUNTY)

On this 5th day of August, 2000, before me personally appeared Thomas VanCleve, to me known to be the person described herein and who executed the foregoing instrument and acknowledged that he voluntarily executed the same.

Notary Public, State of Wisconsin
My Commission Expires: 5/3/03

STATE OF WISCONSIN CIRCUIT COURT MARINETTE COUNTY

RENEE K. VANCLEVE and
THOMAS C. VANCLEVE,

Plaintiffs,

vs.

CASE NO. 99 CV 98
Code No. 30107

CITY OF MARINETTE,
KENNETH KELLER, d/b/a KELLER CEMENT CONTRACTORS,
and AUTO-OWNERS INSURANCE,

Defendants.

and

STATE FARM FIRE AND CASUALTY COMPANY,

Nominal Defendant.

STIPULATION AND ORDER FOR DISMISSAL

IT IS HEREBY STIPULATED by and between all parties, through their respective attorneys, that the claims of plaintiffs, RENEE K. VANCLEVE and THOMAS C. VANCLEVE, against defendants, KENNETH KELLER, d/b/a KELLER CEMENT CONTRACTORS, and AUTO-OWNERS INSURANCE, and all cross-claims by and between defendants, CITY OF MARINETTE and KENNETH KELLER, d/b/a KELLER CEMENT CONTRACTORS, and AUTO-OWNERS INSURANCE, have been fully settled and compromised and the same may, upon presentation of this stipulation to the Court, be dismissed on the merits with prejudice and without costs to any party.

The parties further stipulate that this court reserves jurisdiction over them to enforce the terms of their settlement of this action.

Dated this 29th day of August, 2000.

NASH, SPINDLER, GRIMSTAD & McCRACKEN LLP

William R Wick

By: William R. Wick
Attorneys for Defendants,
Kenneth Keller, d/b/a Keller Cement Contractors, and
Auto-Owners Insurance

Dated this 10th day of August, 2000.

PETRUCELLI & PETRUCELLI, P.C.

Jonny L Waara

By: Attorney Jonny L. Waara
Attorneys for Plaintiffs,
Renee K. VanCleve and Thomas C. VanCleve

Dated this 25th day of August, 2000.

STILP & COTTON

By: Attorney James Moermond
Attorneys for Defendant,
City of Marinette

ORDER

Upon reading and filing the foregoing stipulation and being fully advised in the premises, it is

ORDERED that the above-entitled action by plaintiffs, RENEE K. VANCLEVE and THOMAS C. VANCLEVE, against defendants, KENNETH KELLER, d/b/a KELLER

CEMENT CONTRACTORS, and AUTO-OWNERS INSURANCE, and all cross-claims by and between defendants, CITY OF MARINETTE and KENNETH KELLER, d/b/a KELLER CEMENT CONTRACTORS, and AUTO-OWNERS INSURANCE, be and the same are hereby dismissed on the merits with prejudice and without costs to any party.

The court further orders that it reserves jurisdiction over the parties to enforce the terms of their settlement of this action.

Dated this 4th day of September, 2000.

BY THE COURT:

/s/

Tim A. Duket
Circuit Judge

STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | MARINETTE COUNTY

RENEE K. VANCLEVE and
THOMAS C. VANCLEVE,

Plaintiffs,

vs.

CITY OF MARINETTE and
WAUSAU INSURANCE
COMPANY,

Defendants.

Case No. 99 CV 98

SPECIAL VERDICT

VERDICT

WE, THE JURY, answer the questions of the Special Verdict as follows:

QUESTION NO. 1: At and just before the time Renee K. Vancleve fell, was the City of Marinette negligent?

ANSWER: YES 12 NO _____

QUESTION NO. 2: If you answered Question No. 1 "Yes", then answer this question; otherwise do not answer it.

Was such negligence a cause of Renee K. Vancleve's injury?

ANSWER: YES 11 NO 1

QUESTION NO. 3: At and just before the time Renee K. Vancleve fell, was Kenneth Keller, d/b/a Keller Cement Contractors negligent?

ANSWER: YES 10 NO 2

QUESTION NO. 4: If you answered Question No. 3 "Yes", then answer this question; otherwise do not answer it.

Was such negligence a cause of Renee K. Vancleve's injury?

ANSWER: YES 10 NO 2

QUESTION NO. 5: When Renee K. Vancleve fell on August 24, 1998, was she negligent in the manner in which she conducted herself?

ANSWER: YES 10 NO 2

QUESTION NO. 6: If you answered Question No. 5 "Yes", then answer this question; otherwise do not answer it.

Was such negligence a cause of Renee K. Vancleve's injury?

ANSWER: YES 10 NO 2

QUESTION NO. 7: If you answered "Yes" to more than one of Questions No. 2, 4, and 6, then answer this question; otherwise do not answer it.

Assuming the total negligence related to Renee K. Vancleve's fall to be one hundred percent (100%) what percentage of the negligence that produced the injuries to Renee K. Vancleve do you attribute to:

(a) City of Marinette	90 %
(b) Kenneth Keller d/b/a Keller Cement Contractors	9 %
(c) Renee K. Vancleve	1 %
TOTAL	100 %

QUESTION NO. 8: You must answer this question. What sum of money will fairly and reasonably compensate the plaintiff, Renee K.Vancleve, for the damages she sustained?

A. Past pain, suffering, and disability $15,000.00

B. Future pain, suffering, and disability $60,000.00

QUESTION NO. 9: What sum of money will fairly and reasonably compensate Thomas C. Vancleve for the loss of society and companionship he suffered as a result of the injuries to his wife, Renee K. Vancleve, sustained when she fell on August 24,1998?

$ 0

Dated this 19th day of October, 2000.

Foreperson

Dissenting Juror(s); if any:	Question(s) dissented to:
Audrey Buettmann	#3
Don Nicklaus	#3
Lisa St. Aubin	#4, 5, 6
Carol Hoffmann	#4, 5, 6
Mike C[illegible]	#8
Robert Griggs	#8

STATE OF WISCONSIN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARINETTE

RENEE K. VANCLEVE and THOMAS C. VANCLEVE,

Plaintiffs,

v

CITY OF MARINETTE, and WAUSAU INSURANCE COMPANY,

Defendants.

File No: 99-CV-98

HON. TIM A. DUKET

AUTHENTICATED COPY
LINDA L. DUMKE

JAN 23 2001

CLERK OF COURTS
MARINETTE COUNTY, WI

Judgment

The above-entitled action was heard by the undersigned judge and a jury, and a special verdict was submitted to the jury. Pursuant to the jury's verdict, the plaintiffs move that judgment be entered in accordance with the jury's answers to the special verdict interrogatories.

It is THEREFORE ORDERED AND ADJUDGED that the plaintiffs, Renee VanCleve and Thomas VanCleve, whose address is 1603 Mary Street, Marinette, Wisconsin 54143, have and recover against the defendants, City of Marinette, and Wausau Insurance Company, the sum of Forty-nine thousand three hundred eleven and 15/100 dollars ($49,311.15), which includes agreed upon taxable costs.

Dated: 1/20/00

Tim A. Duket
Circuit Judge

COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

Appeal No. 01-0231 Cir. Ct. No. 99-CV-98

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RENEE K. VANCLEVE AND THOMAS C. VANCLEVE,

PLAINTIFFS-RESPONDENTS,

V.

CITY OF MARINETTE AND WAUSAU INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

KENNETH KELLER, D/B/A KELLER CEMENT CONTRACTORS, KELLER CEMENT CONTRACTORS, AUTO OWNERS INSURANCE, AND STATE FARM FIRE & CASUALTY, CO.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. WISCONSIN STAT. § 81.17 provides conditional protection to a municipality when it is sued along with, for example, a contractor for injuries caused by highway defects. If both the municipality and the contractor are found liable, regardless of the apportionment between them, the contractor is responsible for the entire award, if it can pay. The municipality must pay only if the contractor is unable to pay. However, what happens when the contractor settles with the injured person for less than the amount of the ultimate award? Must the municipality then pay the balance? That is the question here. We hold that the municipality is not responsible for paying any of the award.

BACKGROUND

¶2 On August 24, 1998, Renee VanCleve tripped and fell on a recently constructed curb and gutter in the City of Marinette. She sued the City and Kenneth Keller, a private contractor, alleging negligence in the construction and maintenance of the curb and gutter. The City asserted WIS. STAT. § 81.17 as one of several affirmative defenses. It also cross-claimed against Keller for contribution.

¶3 On August 5, 2000, VanCleve signed a ***Pierringer v. Hoger***, 21 Wis. 2d 182, 192-93, 124 N.W.2d 106 (1963), release in favor of Keller releasing Keller from all claims.[1] The City joined in a stipulation to dismiss Keller from the lawsuit. The stipulation expressly stated that the City's cross-claim against Keller was settled.

[1] A ***Pierringer*** release operates to impute to the settling plaintiff whatever liability in contribution the settling defendant may have to nonsettling defendants and to bar subsequent contribution actions the non-settling defendants might assert against the settling defendants. ***Pierringer v. Hoger***, 21 Wis. 2d 182, 192-93, 124 N.W.2d 106 (1963).

¶4 The case was tried to a jury, which found causal negligence as follows: the City 90%, Keller 9%, and VanCleve 1%.

¶5 The City then moved to have VanCleve's claim dismissed based on WIS. STAT. § 81.17. The City argued that under the statute Keller was primarily liable for the entire judgment and the City was only secondarily liable. The City claimed that the judgment against it was not enforceable until execution of a judgment against Keller was returned unsatisfied. Because VanCleve settled with Keller and was unable to obtain a judgment against Keller, the City contended that VanCleve cannot recover against the City.

¶6 The trial court concluded that WIS. STAT. § 81.17 did not apply because of the ***Pierringer*** release and the stipulation and order to dismiss. The court reasoned that the statute required the City to keep Keller in the lawsuit. However, because the City did not object to the ***Pierringer*** release and, in fact, signed a stipulation to dismiss Keller, the court denied the City's motion and entered judgment against the City.

STANDARD OF REVIEW

¶7 Here, the question involves the application of a statute to undisputed facts. This is a question of law that we review independently of the trial court. ***Kania v. Airborne Freight Corp.***, 99 Wis. 2d 746, 758-59, 300 N.W.2d 63 (1981). The guiding principle in statutory construction is to discern legislative intent. ***State v. Irish***, 210 Wis. 2d 107, 110, 565 N.W.2d 161 (Ct. App. 1997). We first look to the language of the statute itself and attempt to interpret it based on "the plain meaning of its terms." ***State v. Williquette***, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986).

DISCUSSION

¶8 The City argues that the application of WIS. STAT. § 81.17 bars any recovery by VanCleve against the City. It contends that when the jury found Keller liable, Keller's liability became primary. Section 81.17 provides that if damages are caused by the negligence of the City and any other party, the other party shall be primarily liable. ***Id.*** Therefore, the City contends that the judgment against it is not enforceable until execution of a judgment against Keller is returned unsatisfied. Because VanCleve has failed to obtain a judgment against Keller, the City concludes VanCleve cannot recover against the City. The City further contends that it did not waive its affirmative defense under § 81.17 by failing to object to the ***Pierringer*** release or by dismissing its cross-claim against Keller.[2]

I. WISCONSIN STAT. § 81.17

¶9 Under the common law, municipalities were originally immune from tort liability. *See* ***Hayes v. Oshkosh***, 33 Wis. 314, 318-19 (1873). Shortly after statehood, the legislature cracked open the door a bit by permitting lawsuits against municipalities for injuries caused by highway defects. ***Dickens v. Kensmoe***, 61 Wis. 2d 211, 220, 212 N.W.2d 484 (1973). This was the forerunner to present-day WIS. STAT. § 81.15.[3]

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[2] The parties slightly misstate the issue. The briefs and oral argument focused on whether the trial court could enter judgment against the City. WISCONSIN STAT. § 81.17 does not bar entering judgment. Rather, the precise issue is whether VanCleve can enforce a judgment against the City. However, the practical import is the same. Therefore, we will treat the issue as presented by the parties.

[3] WISCONSIN STAT. § 81.15 reads as follows:

(continued)

¶10 Municipalities responded by enacting ordinances to protect themselves from liability. Those "ordinances generally provided that when the negligence of a private tort-feasor had created the defect for which the municipality was also liable statutorily, the municipality's liability was only secondary to the liability of the private tort-feasor." ***Dickens***, 61 Wis. 2d at 215.

¶11 In 1889, the legislature codified the ordinances in statutory form. A statute was enacted containing "almost verbatim the language of these city ordinances." ***Id.*** at 216. Following the 1898 revision, the statute has continued in substantially the same form as WIS. STAT. § 81.17 now reads.[4] ***Dickens***, 61 Wis. 2d at 216.

> If damages happen to any person or his or her property by reason of the insufficiency or want of repairs of any highway which any town, city or village is bound to keep in repair, the person sustaining the damages has a right to recover the damages from the town, city or village. If the damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county is liable for the damages and the claim for damages shall be against the county. If the damages happen by reason of the insufficiency or want of repairs of a bridge erected or maintained at the expense of 2 or more towns the action shall be brought against all the towns liable for the repairs of the bridge and upon recovery of judgment the damages and costs shall be paid by the towns in the proportion in which they are liable for the repairs; and the court may direct the judgment to be collected from each town for its proportion only. The amount recoverable by any person for any damages so sustained shall not exceed $50,000. The procedures under s. 893.80 shall apply to the commencement of actions brought under this section. No action may be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless the accumulation existed for 3 weeks.

[4] WISCONSIN STAT. § 81.17 reads as follows:

(continued)

¶12 As *Armour v. Wisconsin Gas Co.*, 54 Wis. 2d 302, 308, 195 N.W.2d 620 (1972), observed, WIS. STAT. §§ 81.15 and 81.17 must be read in tandem. Had this case arisen before these statutes were enacted, VanCleve could not have sued the City at all. Her only recourse would have been against Keller. He in turn would have been responsible for the entire judgment.

¶13 After WIS. STAT. §§ 81.15 and 81.17, VanCleve was able to sue both Keller and the City. However, the City retained a type of conditional immunity in that Keller was primarily liable. As before, Keller was responsible for the entire verdict, but only if he could pay. If he could not pay, then the City lost its protection, its secondary liability kicked in, and it had to pay any unsatisfied portion of the judgment.

¶14 Common law governmental immunity for tort claims was abrogated by *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). WISCONSIN STAT. § 81.15 "is no longer needed as a basis of liability and its

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> Whenever damages happen to any person or property by reason of any defect in any highway or other public ground, or from any other cause for which any town, city, village or county would be liable, and such damages are caused by, or arise from, the wrong, default or negligence thereof and of any person, or private corporation, such person or private corporation shall be primarily liable therefor; but the town, city, village or county may be sued with the person or private corporation so primarily liable. If the town, city, village or county denies its primary liability and proves upon whom such liability rests the judgment shall be against all the defendants shown by the verdict or finding to be liable for the damages; but judgment against the town, city, village or county shall not be enforceable until execution has been issued against the party found to be primarily liable and returned unsatisfied in whole or in part; on such return being made the defendant town, city, village or county shall be bound by the judgment. The unpaid balance shall be collected in the same way as other judgments.

existence is somewhat ambiguous." ***Dickens***, 61 Wis. 2d at 218. In this context, § 81.17 may seem an anachronism as well. Nevertheless, the legislature has not seen fit to repeal the statute.

¶15 As stated, WIS. STAT. § 81.17 creates primary and secondary liability for injuries caused by highway defects. A curb and gutter falls under the definition of "highway." ***See Weis v. A.T. Hipke & Sons, Inc.***, 271 Wis. 140, 141, 72 N.W.2d 715 (1955). Section 81.17 provides that if damages are caused by the negligence of a municipality and any other party, that other party shall be primarily liable. The statute further states that "judgment against the town, city, village or county shall not be enforceable until execution has been issued against the party found to be primarily liable and returned unsatisfied in whole or in part."

¶16 In ***Weis***, the court held that if a party other than the municipality had any liability to the plaintiff, the other party would be primarily liable under WIS. STAT. § 81.17 and the municipality could only be secondarily liable. ***Weis***, 271 Wis. at 143. "[T]here can be neither joint nor primary liability on the part of the city if [the other party] has any liability to the plaintiff ...." ***Id.*** In other words, the municipality remains primarily liable to the plaintiff "only when there is a failure to fasten what, in the absence of the statute, would be joint liability on someone else ...."[5] ***Id.*** As soon as the other party is found liable, its liability becomes primary. ***Id.***

[5] ***Weis*** suggests that the defendants in WIS. STAT. § 81.17 would be joint tortfeasors if it were not for the statute. Instead, under § 81.17, the defendants are tortfeasors with primary and secondary liability. ***Weis v. A.T. Hipke & Sons, Inc.***, 271 Wis. 140, 143, 72 N.W.2d 715 (1955).

¶17 In ***Dickens***, the court determined that WIS. STAT. § 81.17 does not protect a municipality when only the municipality is liable for creating a highway defect. The court held that § 81.17 "creates a secondary liability on a town, city, village, or county, for defects in a highway which cause damage only when the negligence, wrong, or default of another tort-feasor also causally contributes to that defect." ***Dickens***, 61 Wis. 2d at 220.

¶18 VanCleve claims, nonetheless, the purpose of WIS. STAT. § 81.17 is only to insulate the City from portions of any verdict for which it is not responsible. She argues the statute does not insulate the City from its own liability. In other words, she contends the statute makes the City secondarily liable for Keller's 9%, but it is still primarily liable for its 90%.

¶19 VanCleve cites no controlling authority. The basis for her argument is simply that the legislature would have expressly stated that the City was secondarily liable for its percentage of the liability.

¶20 We conclude, however, that WIS. STAT. § 81.17 is unambiguous. Even if it were ambiguous, the case law and the statutory history, as previously explained, lead to only one conclusion. The statute states that if the damages are caused by the wrong of the City "and of any person, or private corporation, such person or private corporation shall be primarily liable therefor." WIS. STAT. § 81.17. Therefore, a person who has any liability is liable for the entire judgment. *See* ***Weis***, 271 Wis. at 143.

II. ***PIERRINGER*** RELEASE

¶21 The City argues it did not waive its affirmative defense by failing to object to the ***Pierringer*** release. It contends there was no way it could have

objected. According to the City, a non-settling tortfeasor has no control over a plaintiff's decision to settle with another tortfeasor.

¶22 A ***Pierringer*** release operates to impute to the settling plaintiff whatever liability in contribution the settling defendant may have to nonsettling defendants and to bar subsequent contribution actions the non-settling defendants might assert against the settling defendants. ***Pierringer***, 21 Wis. 2d at 193.

¶23 Generally, one joint tortfeasor has a right to contribution from another joint tortfeasor for any sums the first tortfeasor is obligated to pay a plaintiff in satisfaction of the second's liability. ***Fleming v. Threshermen's Mut. Ins. Co.***, 131 Wis. 2d 123, 130, 388 N.W.2d 908 (1986). However, a ***Pierringer*** release by a plaintiff of one joint tortfeasor limits a second joint tortfeasor's liability to the amount reflecting its proportion of wrongdoing; this is because the second tortfeasor's right to indemnification or contribution from the first tortfeasor has been lost due to the plaintiff's actions. ***Fleming***, 131 Wis. 2d at 131.

¶24 "A nonsettling tort-feasor has no control over a claimant's decision to settle with another tort-feasor." ***Unigard Ins. Co. v. Insurance Co. of N. Am.***, 184 Wis. 2d 78, 87 n.5, 516 N.W.2d 762 (Ct. App. 1994). In ***Johnson v. Heintz***, 73 Wis. 2d 286, 291, 243 N.W.2d 815 (1976), a passenger in a car sued the driver and her insurance company, American Family Insurance. American Family then filed a third-party complaint against State Farm for contribution. State Farm insured the driver of a car that rear-ended the car the plaintiff rode in.

¶25 The plaintiff entered into a ***Pierringer*** release with State Farm over American Family's objection. ***Johnson***, 73 Wis. 2d at 294-95. The trial court approved the settlement agreement. On appeal, our supreme court recognized that it was harmless error for the trial court to approve the settlement agreement. ***Id.***

The plaintiff did not have a right to settle with State Farm because there was no direct claim against State Farm. *Id.* at 297. However, the error was harmless because the parties could have taken steps to place themselves in a direct adversary position. *Id.* at 298.

¶26 The court reasoned that had State Farm "been an initial party defendant ... no objection could be raised to the fact that the plaintiff and a joint tortfeasor defendant were exercising the option approved by ***Pierringer***. "The settlement of the claim against a defendant under those circumstances requires that he be dismissed from the action." *Id.* at 297.

¶27 VanCleve argues that by failing to object to the ***Pierringer*** release, the City waived its affirmative defense under WIS. STAT. § 81.17 and implicitly agreed to become a joint-tortfeasor. VanCleve contends that the City could have objected to the ***Pierringer*** release because it wasclaiming secondary liability, but it chose not to do so.

¶28 Based upon the applicable case law, we conclude the City could not have kept Keller in the lawsuit by objecting to the ***Pierringer*** release. *See* ***Unigard Ins.***, 184 Wis. 2d at 87 n.5. Any attempt by the City to object to the ***Pierringer*** release would have been unsuccessful because VanCleve and Keller were direct adversaries. *See* ***Johnson***, 73 Wis. 2d at 299.

¶29 VanCleve cites no authority to support her argument that a non-settling tortfeasor, claiming secondary liability as an affirmative defense, is required to object to a ***Pierringer*** release. The result of this would be to effectively prohibit a ***Pierringer*** release by barring VanCleve from settling her claim against Keller.

¶30 The ***Pierringer*** release, voluntarily agreed to by VanCleve and Keller, required that Keller be dismissed from the lawsuit. The City had no way of keeping Keller in the lawsuit and the ***Pierringer*** release effectively dismissed the City's cross-claim against Keller.

¶31 There are distinct consequences arising from the execution of a ***Pierringer*** release. "The existence of these consequences cannot be questioned and ought be a forewarning to the unwary." ***Unigard Ins.***, 184 Wis. 2d at 86. By opting for the ***Pierringer*** release, VanCleve gambled that the jury would not find Keller liable.

¶32 We conclude that the non-settling City, claiming secondary liability as an affirmative defense, was not required to object to a ***Pierringer*** release in order to retain its affirmative defense. It is VanCleve's responsibility to evaluate the effects of a ***Pierringer*** release and to determine whether the release is in her best interests.

III. STIPULATION AND ORDER

¶33 The City argues it did not waive its affirmative defense by stipulating to dismiss its cross-claim against Keller. It contends that, while the stipulation and order expressly waived the City's cross-claim against Keller, the WIS. STAT. § 81.17 affirmative defense was not waived because the stipulation and order did not mention the defense.

¶34 In contrast, VanCleve argues that the City waived its affirmative defense by dismissing its cross-claim against Keller. After VanCleve signed the ***Pierringer*** release, the City signed the stipulation expressly settling the City's cross-claim against Keller.

¶35 The City's cross-claim for contribution and the affirmative defense are two distinct parts of the pleadings. The City's affirmative defense is not conditioned on its contribution claim, but is an independent and separate part of the City's answer. *See* WIS. STAT. § 802.01(1).

¶36 VanCleve cites no authority for the argument that dismissing the cross-claim against Keller waived the City's affirmative defense under WIS. STAT. § 81.17. The defense was not waived because the stipulation and order did not mention the City's affirmative defense.

¶37 In addition, the language dismissing the City's cross-claim in the stipulation and order was unnecessary. The cross-claim had already been rendered moot when VanCleve signed the ***Pierringer*** release. By a ***Pierringer*** release, Keller's liability was transferred to VanCleve, and any claim the City may have had against Keller was barred. *See* ***Pierringer***, 21 Wis. 2d at 193. In other words, the City effectively lost its cross-claim for contribution when VanCleve signed the ***Pierringer*** release. For these purposes, the stipulation and order to dismiss was superfluous.

IV. SETTLEMENT OF PERSONAL INJURY CLAIMS

¶38 VanCleve asserts that the City's arguments would stifle settlement of personal injury claims. She claims the "social policy favoring settlements is stronger than that favoring contribution among tort-feasors." *See* ***Smith v. Rural Mut. Ins. Co.***, 20 Wis. 2d 592, 603, 123 N.W.2d 496 (1963). According to VanCleve, application of WIS. STAT. § 81.17 does not promote settlement and runs counter to the abrogation of governmental immunity. *See* ***Holytz***, 17 Wis. 2d at 29.

¶39 There are two problems with VanCleve's argument. First, as we have already held, the words of WIS. STAT. § 81.17 are unambiguous. *See* ***Dickens***, 61 Wis. 2d at 217. Considerations of public policy cannot trump an unambiguous statute. ***Kelley Co. v. Marquardt***, 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992).

¶40 Second, the public policy implications are not one-sided. VanCleve suggests settlements will be discouraged if the City's arguments prevail. However, it is possible that settlements will be discouraged whichever way we decide. On the one hand, if the City prevails, plaintiffs may no longer settle with non-municipal defendants for fear of the application of primary and secondary liability. On the other hand, if VanCleve prevails, settlement agreements may be rendered useless because municipalities will have the power to keep the non-municipal defendants in the lawsuit.

¶41 Therefore, the problem for settlements will not be resolved on the basis of who prevails here. Rather, the problem is with the statute and for the legislature to address. As far as we are aware, WIS. STAT. § 81.17 is unique. A municipality is not protected this way in any other kind of lawsuit. The historical reason for the statute disappeared when governmental immunity was abolished. As long as § 81.17 continues on the books, settlements will be discouraged.

By the Court.—Judgment reversed.

Recommended for publication in the official reports.

STATE OF WISCONSIN
SUPREME COURT

RENEE K. VANCLEVE and
THOMAS C. VANCLEVE,

Plaintiffs-Respondents-
Petitioners, Case No. 01-0231

v.

CITY OF MARINETTE
and WAUSAU INSURANCE COMPANY,

Defendants-Appellants,

KENNETH KELLER, d/b/a KELLER
CEMENT CONTRACTORS, AUTO OWNERS
INSURANCE and STATE FARM FIRE &
CASUALTY, CO.,

Defendants

DEFENDANTS-APPELLANTS CITY OF MARINETTE AND WAUSAU INSURANCE COMPANY'S BRIEF

Appeal from the Circuit Court for Marinette County
Honorable Tim A. Duket
Trial Court Case No. 99-CV-98

James O. Moermond III
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Appellants City of Marinette and
Wausau Insurance Company

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STATEMENT OF ISSUES

1. Whether the application of **Wis. Stats. Section 81.17** bars any recovery by VanCleve against Marinette?

Answered by the Trial Court: No.

Answered by the Court of Appeals: Yes.

Marinette believes that the application of **Wis. Stats. Section 81.17** does bar recovery against Marinette because VanCleve has not obtained a judgment against Keller as is required by that statute.

2. Whether Marinette waived its affirmative defenses against VanCleve's claims?

Answered by the Trial Court: Yes.

Answered by the Court of Appeals: No.

Marinette did not waive any of its affirmative defenses, including those found at **Wis. Stats. Section 81.17.**

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The briefs should fully present and meet the issues, however, oral argument may helpful to the Court.

Publication of this decision is warranted. This appeal involves the application of a statute to undisputed facts, however, this case does appear to be one of first impression. This case involves a fairly common situation, the application of a statute after a party has been dismissed pursuant to a Pierringer Release.

STATEMENT OF THE CASE AND FACTS

On or about August 24, 1998, Renee K. VanCleve tripped and fell at or near a small trench immediately adjacent to a newly installed cement curb and gutter in Marinette, Wisconsin.

Renee K. VanCleve and Thomas C. VanCleve (referred to herein as "VanCleve") then sued the City of Marinette and Wausau Insurance Company (referred to herein as "Marinette") and Kenneth Keller d/b/a Keller Cement Contractors and their insurer, Auto Owners Insurance Company (referred to herein as "Keller").

VanCleve alleged that both Marinette and Keller were negligent. Marinette expressly asserted the provisions of **Wis. Stats. Section 81.17,** as one of its affirmative defenses. **R. 9 and R. 27.**

Keller's insurance policy was filed with the Court by letter dated January 18, 2000. The relevant policy limit is $500,000.00. **R. 18.**

VanCleve signed a Pierringer Release on August 5, 2000, in favor of Keller and based on that release, Keller was dismissed from this lawsuit, pursuant to a Stipulation and Order. **R. 23.**

There has never been a judgment entered in favor of VanCleve against Keller.

This case was tried to the jury based on the comparative negligence of VanCleve, Marinette, and Keller. VanCleve and Marinette both requested the highway defect instruction, and the jury was so instructed. The jury rendered a verdict finding Keller to be 9% contributorily negligent for the plaintiff's injuries. **R. 42.**

VanCleve and Marinette, stipulated to the instructions, verdict form, and to the verdict itself as rendered by the jury by stipulating to waive any potential defects with that verdict. **R.58 and R.59.**

Marinette brought a Motion After Verdict pursuant to **Wis. Stats. Section 81.17**. The Trial Court denied Marinette's motion adopting VanCleve's arguments. An appeal was subsequently filed.

The Court of Appeals in their decision dated December 18, 2001, reversed the Trial Court.

The Wisconsin Supreme Court has granted VanCleve's Petition for Review.

ARGUMENT

Standard of Review

The application of a statute to undisputed facts, and the construction of a written document, present a questions of law for the Court. *See generally* **Kania v. Airborne Freight Corp.**, 99 Wis.2d 746, 300 N.W.2d 63 (1981).

I. THE APPLICATION OF WIS. STATS. SECTION 81.17 BARS ANY RECOVERY BY VANCLEVE AGAINST MARINETTE.

Marinette and Keller were both found liable for the creation of a highway defect. **Wisconsin Stats. Section 81.17** applies when a city is sued with a private entity such as a contractor, for injury caused by highway defects. If both the city and contractor are found liable, regardless of the apportionment between them, the contractor is responsible for the entire award if it can pay. The city must pay only if the contractor is unable to pay and execution against that contractor has been returned unsatisfied. This is true even when the contractor settles with the injured person prior to the case being tried to a jury.

When the jury found Keller to be liable, at all, Keller's liability became primary pursuant to **Wis. Stats. Section 81.17.** Because VanCleve has failed to obtain a judgment against Keller, VanCleve cannot recover against Marinette. This case is controlled by **Wis. Stats. Section 81.17**, which reads as follows:

> Whenever damages happen to any person or property by reason of any defect in any highway or other public ground, or from any other cause for which any town, city, village or county would be liable, and such damages are caused by, or arise from, the wrong, default or negligence thereof and of any person, or private corporation, such person or private corporation shall be primarily liable therefor; but the town, city, village or county may be sued with the person or private corporation so primarily liable. If the town, city, village or county denies its primary liability and proves upon whom such liability rests the judgment shall be against all the defendants shown by the verdict or finding to be liable for damages; **but judgment against the town, city, village or county shall not be enforceable until execution has been issued against the party found to be primarily liable and returned unsatisfied in whole or in part;** on such return being made the defendant town, city, village or county shall be bound by the judgment. The unpaid balance shall be collected in the same way as other judgments. (emphasis added).

In **Dickens v. Kensmoe,** 61 Wis.2d 211, 220, 212 N.W.2d 484, 489 (1973), the Wisconsin Supreme Court held that **Wis. Stats. Section 81.17**:

> creates a secondary liability on a town, city, village, or county, for defects in a highway which cause damage only when the negligence, wrong, or default of another tortfeasor also causally contributes to that defect.

In **Dickens**, the Court considered the earlier opinion of **Weis v. A.T. Hipke & Sons, Inc.**, 271 Wis. 140, 72 N.W.2d 715 (1955). The Court stated that it was obvious in **Weis** that the liability of the private contractor and the city arose as a consequence of their joint participation and contribution to the creation of a sidewalk defect.

This is exactly what happened in this case. Marinette and Keller were both found to have causally contributed to the creation of the sidewalk defect.

The Wisconsin Supreme Court addressed the application of **Wis. Stats. Section 81.17** and in particular the issue of primary versus secondary liability as between private and public entities in the case of **Weis v. A.T. Hipke & Sons, Inc.**, 271 Wis. 140, 72 N.W.2d 715, 717(1955).

> [The] statute says that if the damages are caused by the wrong of the city 'and of any person, or private corporation, such person or private corporation shall be primarily liable therefor.' In other words, there can be neither joint nor primary liability on the part of the city

> if a person or private corporation has **any** liability to the plaintiff in the premises. . . . As soon as the private corporation is found liable because of its own wrong, default or negligence, its liability becomes primary and neither joint or secondary. The statute takes care of that….
>
> In the present case we are faced again by the stubborn statute, sec. 81.17, which declares that if Hipke [a private entity] is liable **at all** to the plaintiff, any liability the city may have is only for that portion of damages and costs which Hipke [a private entity] is unable to pay. By statute the liabilities of these tort-feasors from the outset are successive, rather than joint. . . . **Weis**, 271 Wis. at 143-144, 72 N.W.2d at 717. (emphasis added).

In **Weis**, the Wisconsin Supreme Court held on demurrer that if both the private contractor and the city were liable to the plaintiff because of the defect in the sidewalk, the city would only be secondarily liable.

Once the jury found that Keller was liable, at all, Keller's liability became primary by statute. Marinette's liability is thus successive, rather than joint.

The facts of **Weis** are similar to the VanCleve case. In **Weis** the plaintiff was injured when he stepped off of a sidewalk and into a ditch. In VanCleve, the plaintiff was injured when she attempted

to step onto the street but stepped into a small ditch by accident.

The **Weis** case and VanCleve case are procedurally different. In **Weis**, there was no direct claim made against the City. Based on the application of **Wis. Stats. Section 81.17**, there was no set of circumstances which would allow for a recovery against the city in that lawsuit and thus the City's demurrer was granted. In VanCleve, there was a direct claim made against Marinette which distinguishes VanCleve from **Weis** procedurally.

In VanCleve, there were circumstances under which VanCleve could recover against Marinette, in particular, a finding by the jury that Keller had zero negligence.

However, once Keller was found negligent by the jury because of Keller's own negligence, Keller's liability became primary, and neither joint nor secondary. Marinette's liability is successive to Keller's liability. It is not joint. Because Keller was found by the jury to be liable to VanCleve, Marinette is liable for only that portion of the damages and costs which Keller is unable to pay. **Weis**, 271 Wis. at 143-144, 72 N.W.2d at 717.

VanCleve argues, without legal authority, that **Wis. Stats. Section 81.17** should be interpreted or constructed as meaning that Marinette is only responsible for the percentage of causal negligence attributed to it by a jury. This would essentially nullify, or render superfluous **Wis. Stats. Section 81.17,** when read together with **Wis. Stats. Section 895.045.** VanCleve's unsupported argument violates a cardinal rule of statutory interpretation, and it should be rejected. See generally **Colby v. Columbia County, 202 Wis. 2d 342, 349, 550 N.W. 124, 127 (1996).**

Moreover, this interpretation ignores the fact that the critical language of **Wis. Stats. Section 81.17** has remained unchanged since 1898. See **Dickens**, 61 Wis.2d at 216-217, 212 N.W.2d at 487. In **Dickens**, the Court cited numerous cases supporting the interpretation that **Wis. Stats. Section 81.17** creates secondary liability, including the **Weis** case, and concluded by distinguishing the **Weis** case on its facts. **Dickens**, 61 Wis.2d at 218n.5, and 219-220, 212 N.W.2d at 488n.5, and 488-489.

The **Dickens** court also cited **Armour v. Wisconsin Gas Company**, 54 Wis.2d 302, 195 N.W.2d 620 (1972),

where the Wisconsin Supreme Court also distinguished the case before it on its facts. In **Armour**, the Court found that **Wis. Stats. Section 81.17** does not apply to a tunnel dug under the street, and limited the statute's application to highway defects, including sidewalk defects.

The Wisconsin Supreme Court has clearly and consistently interpreted **Wis. Stats. Section 81.17.**

It is undisputed that Keller would be able to pay the judgment and Keller's policy of insurance was filed with Court. **R.18**.

No judgment has been entered against Keller in favor of VanCleve. Therefore, pursuant to the express terms of **Wis. Stats. Section 81.17**, and the Wisconsin Supreme Court cases interpreting that statute, VanCleve cannot enforce any judgment against Marinette. This is because the express condition precedent in the statute has not been met by VanCleve.

VanCleve argues, without legal authority, that she could still get a judgment entered against Keller in spite of releasing Keller from any and all claims. This argument should be rejected.

VanCleve released Keller and can never get a judgment against Keller. Because the express

condition precedent of **Wis. Stats Section 81.17** can never be met, VanCleve can never proceed against Marinette. Therefore, VanCleve's lawsuit should be dismissed.

II. MARINETTE DID NOT WAIVE ANY OF ITS AFFIRMATIVE DEFENSES AGAINST VANCLEVE'S CLAIMS.

A. The Pierringer Release.

On August 5, 2000, VanCleve signed a **Pierringer v. Hoger**, 21 Wis.2d 182, 192-193, 124 N.W.2d 106, 111-112 (1963), Release in favor of Keller, releasing Keller from all claims. A Pierringer Release imputes to the settling plaintiff whatever liability the settling defendant may have to the non-settling defendants and bars a subsequent contribution action by the non-settling defendants against the settling defendants.

VanCleve argues, without legal authority, that Marinette had the right to successfully object to the dismissal of Keller and that because Marinette stipulated to the dismissal of Keller pursuant to the terms of a Pierringer Release, Marinette has waived its statutory affirmative defenses.

This argument should be rejected.

There is no basis under Wisconsin law for Marinette to object to the dismissal of Keller once a Pierringer Release of Keller has been signed by VanCleve. Marinette does not have standing to object, assuming that standing requires a legal basis for making that objection.

In **Pierringer**, a settling defendant moved for summary judgment to dismiss a cross claim of a non-settling defendant for contribution, after completing what is now known as a Pierringer Release. The motion was granted, and affirmed by the Wisconsin Supreme Court. So long as the comparative and contributory negligence of all the relevant actors is determined by the jury, there is no requirement that the settling defendant remain a party to the suit. **Pierringer**, 21 Wis.2d 182, 124 N.W.2d 106.

> Development of the law, of course, has enabled a joint tort feasor to "buy his peace" and avoid being subject to a contribution action of the agreement meets the requirements of *Pierringer*, so as to satisfy the equities that normally afford the contribution right to the other joint tortfeasors. . . .
>
> If State Farm had been an initial party defendant in the damage claim of the Johnsons, **no objection could be raised to the fact that the plaintiff and a joint tort feasor defendant were exercising the option approved by *Pierringer*. The settlement of the claim against a**

> **defendant under those circumstances requires that he be dismissed from the action.** Unfortunate effects from a viewpoint of trial tactics may or may not result to the non-settling codefendants, but these incidences do not constitute a legally cognizable bar to the release, which is facilitating a policy of reducing litigation and stimulating accord. **Johnson v. Heintz**, 73 Wis.2d 286, 296-297, 243 N.W.2d 815, 823 (1976) (emphasis added).

"A non-settling tort feasor has no control over a claimant's decision to settle with another tort feasor." **Unigard Insurance Co. v. Insurance Co. of North America**, 184 Wis.2d 78, 87 n.5, 516 N.W.2d 762, 765 n.5 (Ct. App. 1994).

The reason why a non-settling co-defendant cannot object to a Pierringer is because the potential liability of the settling defendant is assumed by the plaintiff. Pursuant to the terms of the Pierringer, VanCleve assumed all of Keller's potential liability.

Marinette's cross-claim against Keller, was a standard cross-claim for indemnification and contribution. The terms of a Pierringer Release effectively eliminate the need for any such cross-claim. Similarly, Marinette's ability to object to Keller's dismissal, once a Pierringer has been signed in Keller's favor, is eliminated, and Keller is entitled to be dismissed from the lawsuit. *See*

Johnson, 73 Wis.2d at 296-297, 243 N.W.2d at 823, and **Pierringer**, 21 Wis.2d at 192-193, 124 N.W.2d at 111-112.

Wisconsin Stats. Section 81.17 does not require Marinette to proceed in contribution or indemnification against Keller.

Wisconsin Stats. Section 81.17 also does not support VanCleve's proposed objection. The subject matter of a Pierringer Release is contribution among joint tort feasors. The subject matter of **Wis. Stats. Section 81.17** is primary versus secondary, or successive liability to a plaintiff. An objection to the dismissal of a settling defendant, based on contribution under Pierringer, cannot be sustained by reliance upon a statute, sec 81.17, the subject matter of which is contribution between joint tort feasors. Rather, its subject is primary and secondary, or successive liability to a plaintiff. The Pierringer Release and section 81.17 have different subjects.

B. The Stipulation and Order.

The Stipulation and Order of Dismissal, **R. 23**, is not a waiver of affirmative defenses. Marinette's cross-claim for contribution and the affirmative

defenses are two distinct parts of the pleadings. Marinette's affirmative defenses against VanCleve's claims are not conditioned on the contribution claim against Keller. Rather, it is an independent and separate part of the Marinette's responsive pleadings. See **Wis. Stats. Section 802.01(1).**

The Stipulation and Order of Dismissal does not resolve any of the claims between VanCleve and Marinette.

VanCleve cites no authority for the argument that dismissing the cross-claim against Keller waived Marinette's affirmative defense under **Wis. Stats. Section 81.17.** The affirmative defense was not waived because the stipulation and order did not mention the affirmative defense.

The Wisconsin Supreme Court has held that a writing must contain an express statement waiving a statutory affirmative defense in order to find a waiver of statutory affirmative defenses.

In **Gonzalez v. City of Franklin**, 137 Wis.2d 109, 132-133, 403 N.W.2d 747, 756 (1987), the Court considered an insurance contract which contained no express statement which could be construed to waive the statutory affirmative defense of limitation of

recovery. Absent such an express statement, the Wisconsin Supreme Court held that the city did not waive its statutory affirmative defenses.

Marinette did not waive any of its affirmative defenses in the Stipulation and Order of Dismissal of Keller. Marinette merely acquiesced to the dismissal of a codefendant under circumstances which the Wisconsin Supreme Court has stated that no objection can be raised and that dismissal of the released defendant is required. *See* **Johnson** 73 Wis.2d at 296-297, 243 N.W.2d at 823, and **Pierringer,** 21 Wis.2d 182, 124 N.W.2d 106. This is hardly an express waiver by Marinette of their statutory affirmative defenses regarding Keller's primary negligence.

If, for the sake of argument, there were a requirement that the pleadings must be restated in a stipulation, then VanCleve's complaint and amended complaint would need to be dismissed because those claims were not restated in the stipulation. Again, VanCleve's argument is advanced without legal authority. It should be rejected.

From the verdict alone in this case, it is obvious Marinette did not waive the affirmative defenses of VanCleve's and Keller's contributory negligence. No one thought that Marinette waived any

of its affirmative defenses, including the affirmative defenses found in **Wis. Stats. Section 81.17**.

The Pierringer Release expressly contemplates that a jury might ultimately determine Keller's, contributory negligence. VanCleve submitted a special verdict form which also clearly anticipated that the jury would apportion Keller's liability. In the Pierringer Release, VanCleve agreed to assume all of the liabilities of Keller and released Keller. The Pierringer Release expressly contemplates that those respective liabilities will be, or at least could be, determined by a jury's apportionment of negligence.

Marinette is not asserting a claim of contribution or indemnity against Keller. That claim was expressly obviated by the Pierringer Release and was dismissed by Stipulation and Order of Dismissal.

It cannot be said that VanCleve reasonably relied upon the stipulation by Marinette to the dismissal of Keller as a clear and unambiguous assertion by Marinette that they would waive any of the affirmative defenses in their responsive pleadings.

VanCleve and Marinette both requested a special verdict form which asked the jury to apportion Keller's liability in this case. VanCleve cannot

argue that they are not bound by the legal effect of such a finding by the jury.

By stipulating to the dismissal of Keller, Marinette merely acquiesced to something for which they had no basis to object.

C. Settlement of Personal Injury Claim.

VanCleve argues that there is a social policy favoring settlements which is stronger than that favoring contribution among tort feasors.

First, this case does **not** involve contribution among joint tort feasors. It does involve primary versus secondary liability. *See* **Weis**, 271 Wis. at 143-144, 72 N.W.2d at 717, and **Wis. Stats. Section 81.17.**

Second, **Wis. Stats. Section 81.17** is unambiguous and has been interpreted clearly and consistently by the Wisconsin Supreme Court.

Considerations of public policy cannot trump an unambiguous statute. **Kelley Co. v. Marquardt**, 172 Wis.2d 234, 247, 493 N.W.2d 68, 74 (1992). Moreover, it is clear that **Wis. Stats. Section 81.17** is viable.

> Consistent with the obvious purpose of Holytz to abrogate municipal immunity to liability to tort claims, we believe sec.

> **81.17**, Stats., should be limited to highway defects, including defects in sidewalks or obstructions in the highway or sidewalk. **Armour**, 54 Wis.2d at 308, 195 N.W.2d at 623.

Finally, the Court of Appeals' decision in no way hinders settlement of claims such as the one in this case. All settlements involve risk. There are significant and distinct consequences arising from the execution of a Pierringer Release. It is VanCleve's responsibility to evaluate those consequences.

> "The existence of these consequences cannot be questioned and ought be a forewarning to the unwary." **Unigard Ins.**, 184 Wis.2d at 86, 516 N.W.2d at 765.

VanCleve, by settling with Keller, took the sure money from Keller, and gambled that the jury would not find Keller liable. Perhaps she did so for tactical reasons. The fact that the jury did not decide the case as VanCleve hoped it would, does not set forth a compelling legal or policy argument.

It cannot be seriously argued that an unambiguous statute, the critical language of which has changed in over 100 years, and which has been clearly and consistently interpreted by the Wisconsin Supreme Court, in any way hinders the settlement of a case.

CONCLUSION

First, Wis. Stats. Section 81.17 bars any recovery by the VanCleve against Marinette. Because the jury found a private contractor, Keller, contributorily negligent, Marinette's liability is successive and secondary. The doctrine of joint and several liability does not apply once the jury has found Keller to be negligent.

Wis. Stats. Section 81.17 expressly requires as a condition precedent to recovery against a municipality that judgment be entered against a private contractor who has been found to be negligent. No such judgment has ever been entered against Keller. Therefore the express condition precedent in the statute has not been met, and VanCleve cannot proceed against Marinette.

Second, the dismissal of Keller was required once a Pierringer Release was given to Keller by VanCleve for consideration.

Third, the Stipulation and Order of Dismissal dismissing Keller from this lawsuit, does not contain, and is not an express waiver of Marinette's affirmative defenses against VanCleve.

Fourth, Wis. Stats. 81.17 and the Wisconsin Supreme Court opinions, clearly and consistently interpreting that statute, do not in any way hinder the settlement of lawsuits.

Marinette and Wausau Insurance Company respectfully request that the Wisconsin Supreme Court affirm the decision of the Court of Appeals and dismiss the plaintiffs' Complaint against Marinette.

Dated this 12th day of June, 2002.

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I, Ann M. Eisenman, certify that on June 12, 2002, I served the within document on counsel of record by mail, pursuant to Wis. Stats. 801.14(2).

Ann M. Eisenman
Law Offices of STILP AND COTTON

CERTIFICATION

I certify that this brief meets the form and length requirements of rule 809.19(8)(b) and (c) in that it is:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 23 pages.

Dated this 12th day of June, 2002.

Signed,

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June 12, 2002

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Re: Renee K. VanCleve, et al. vs.
City of Marinette, et al.
Case No. 01-0231
Trial Court Case No. 99-CV-98
Our File No. P 346-977457-01

Dear Ms. Clark:

I am writing with regard to the Brief which we filed on behalf of the defendants-appellants by letter dated June 12, 2002.

In the last paragraph on page 20, I inadvertently left out the word "not" and have produced the paragraph as it should read below.

> It cannot be seriously argued that an unambiguous statute, the critical language of which has not changed in over 100 years, and which has been clearly and consistently interpreted by the Wisconsin Supreme Court, in any way hinders the settlement of a case.

Thank you.

Very truly yours,

STILP AND COTTON

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